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August 13, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

RE: In the Matter of

1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations; Notice of Proposed Rulemaking

IB Docket No. 98-118

Dear Ms. Roman Salas:

Enclosed for filing please find an original and nine copies of the Federal Bureau of Investigations' Comments to the Commission's captioned Notice of Proposed Rulemaking.

Sincerely,

Larry R. Parkinson
General Counsel
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FBIHQ
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(202) 324-8593

cc: International Bureau (Ms. Regina Keeney)
International Bureau (Mr. Douglas Klein)
International Bureau (Ms. Diane Cornell)
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Before the
Federal Communications Commission
Washington, D.C. 20554

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	)	
1998 Biennial Regulatory Review	)	**IB Docket No. 98-118**
Review of International Common Carrier	)	
Regulations	)	

COMMENTS OF THE FEDERAL BUREAU OF INVESTIGATION

Larry R. Parkinson
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SUMMARY

The Commission is required under 47 U.S.C. § 161 to review all regulations issued under the Communications Act and "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." Economic competition, however, is but a factor in any public interest analysis and determination and is not dispositive. Other factors, such as national security, law enforcement, foreign policy, and trade concerns are also important component parts of the "public interest." Moreover, proposals for regulatory relief cannot proceed where they would operate such as to override important provisions in the statutes that the regulations are intended to effectuate.

The FBI strongly opposes the proposal that would permit "unaffiliated" international carriers to offer service *prior to* Commission certification and other Executive Branch review mandated by Section 214, believing such proposal to be contrary to law and imprudent. Further, we oppose dispensing with certification *prior to* international carrier service offerings as to all carriers, small or large, resellers or facilities-based, affiliated or not, and without reference to the type of service offered (to include CMRS).

The FBI agrees with the Commission's tentative conclusion not to employ forbearance in treating international Section 214 authorizations for any class of applicants. We also oppose the

use of forbearance with regard to *prior* application and approval requirements as they pertain to certain categories of carrier "assignments and transfers of control" deemed *pro forma*, such as that involving corporations and wholly owned subsidiaries, because we believe it does not fully satisfy the public interest under 47 U.S.C. §160(a)(3). The FBI also opposes the Commission's proposal "that an international Section 214 authorization effectively [would authorize] the carrier to provide services through its wholly owned subsidiaries."

If assurance is given that the FBI would have an opportunity for review and a right-to-be-heard *prior to* the grant of cable landing licenses, under *either* 47 U.S.C. §§ 34-39 *or* 47 U.S.C. § 214, it would suffice. Thus, redundant filings under Section 214 could be dispensed with. The FBI would not oppose the Commission's proposed treatment of new construction of submarine cable facilities if the review and right-to-be-heard requirements under the Submarine Cable Landing License Act are available to the FBI *prior to* licensing.

Finally, the FBI agrees with the Commission that it should not include non-U.S.-licensed satellite system issues in the current rulemaking.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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COMMENTS OF THE FEDERAL BUREAU OF INVESTIGATION

The FBI welcomes the opportunity to comment on the Federal Communication Commission's (Commission) Notice of Proposed Rulemaking (NPRM) with regard to International Common Carrier Regulations, IB Docket No. 98-118.

A. Blanket Section 214 Authorization for International Service to Unaffiliated Points

1. Generally, the FBI is supportive of periodic regulatory review, believing it to be both proper and useful for all regulatory agencies. We believe, however, that any such review should begin with reference to (a) the underlying statutes that the regulations are intended to effectuate and (b) whether any proposed changes to such regulations are consistent with and further those statutory provisions. Care must be taken in such a review to ensure that, in the spirit of reducing unneeded regulation, any proposed regulatory amendments do not go too far and thereby erode or eviscerate substantive provisions found in the underlying statutes and regulations.

2. As part of the Telecommunications Act of 1996, the Congress amended the Communications Act by enacting, *inter alia*, a new provision related to regulatory relief, codified at 47 U.S.C. § 161. As part of a Congressionally-mandated biennial review specified under Section 161, the Commission is required to review all regulations issued under the

Communications Act and "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."

3. It is well established that "economic competition between [service providers]" is but a factor in any public interest analysis and determination.[1] This one factor is neither controlling nor dispositive.[2] The Commission has repeatedly stated that other factors, such as national security, law enforcement, foreign policy, and trade concerns are also important component parts of the "public interest" review.[3]

4. Therefore, we read Section 161 as authorizing the Commission to eliminate or reduce regulation in the Section 214 regime to the extent that any such regulation is no longer necessary under *that part of* the public interest analysis peculiarly related to "meaningful economic competition." However, we do not read Section 161 to operate as effectively repealing important provisions found within Section 214 (as discussed below) or as overriding other critical component parts of the "public interest" review. We believe that, under Section 161, considerations of increased competition among service providers may satisfy that part of the

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[1] *See, e.g.*, In the Matter of Market Entry and Regulation of Foreign Affiliated Entities (Foreign Carrier Entry Order), FCC 95-475, IB Docket No. 95-22, 11 FCC Rcd. 3873 (1995).

[2] *See, e.g.*, Foreign Carrier Entry Order, *supra*, ¶¶ 19, 28, 35, and 179. Historically, the Commission, under the rubric of its "effective competitive opportunities" (ECO) analysis, considered economic competition and other factors in its Section 214 licensing regime analysis. Further, and notwithstanding consideration of World Trade Organization (WTO) commitments, the Commission has continued to recognize (and properly so) that other factors in addition to competition remain in place, and constitute part of any public interest analysis. *See also*, In the Matter of Rules and Policies of Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142.

[3] *Id.*

public interest test related to competition in the telecommunications market place, and support Commission actions to eliminate or reduce regulation, *if, and only if, the mandates of Section 214 are not abrogated and other factors in the public interest are not harmed or jeopardized.*

5. In the instant NPRM, the Commission proposes to "[g]rant a blanket Section 214 authorization for telecommunications services to unaffiliated international points." NPRM at ¶ 2. For the reasons set forth below, the FBI strongly opposes such a proposal, believing that it is contrary to law and imprudent.

6. In considering Section 214, a statute underlying much of the Commission's international service regulatory regime and review, one immediately notices that numerous public interest-related provisions and factors, having nothing to do with economic competition, are at play.[4] Owing to the public interest (and absent temporary or emergency service considerations), the Congress has specifically directed that "[n]o carrier *shall* undertake the construction of a new line ... or acquire or operate any line ... or engage in transmission over [a line], unless and until there *shall first* have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation ... of such additional or extended line" (emphasis added). 47 U.S.C. § 214(a). It is hard to imagine a clearer Congressional directive -- one mandating ("shall") the Commission's review and certification as an absolute *condition precedent* to any construction, acquisition,

[4] *See, e.g.*, Section 214(e) (where, in the public interest, carrier "universal service"-related obligations are addressed and, moreover, can be ordered by the Commission or by State commissions.)

operation, or use (for purposes of transmission) of a line.[5] Consequently, although Section 161 authorizes potential regulatory relief through the Commission, it clearly does not purport to repeal, or authorize the Commission to override, the foregoing "bright line" and "black letter" Congressional mandate of pre-license certification and review found in Section 214.

7. Further, under Section 214(b), "upon receipt of an application for any such certificate," the Commission is mandated ("shall") to provide notice and a copy of the application to, *inter alia*, the Secretary of Defense and the Secretary of State with regard to applications for international service, "with the right to those notified to be heard" (emphasis added).[6] The obvious Congressional intent manifested in Section 214(b) is to ensure that proper notice would be given to defense, national security, law enforcement, diplomatic, and other agencies before any certificate is granted. Indeed, it is entirely possible that a certificate would not be issued (or alternatively would only be issued subject to terms and conditions[7]) by the Commission, directly owing to (a) such interagency notice and review and (b) the assertion of defense, national security, law enforcement,[8] or diplomatic concerns which, as a matter of *right*, may be voiced by

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[5] *See also* 47 U.S.C. 214(c) ("After issuance of such certificate, and not before, the carrier may ... comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with construction ..."(emphasis added)), underscoring the Congress' dictate that Commission certificate approval must precede carrier action.

[6] For some time now, the Commission has also provided notice and copies of "214 Applications" to other Executive Branch agencies in the U.S. law enforcement and intelligence communities, among others, as part of an appropriate public interest review.

[7] 47 U.S.C. §214(c).

[8] The FBI has previously furnished the Commission (in other NPRMs) with a copy of a letter from FBI Director Louis J. Freeh and Drug Enforcement Administrator (DEA) Administrator Thomas A. Constantine to the Honorable John D. Dingell, former Chairman, Committee on Energy and Commerce, U.S. House of Representatives, dated May 24, 1995 (copy attached), regarding the potential threats related to law enforcement and national security-based

such Executive Branch agencies.[9] Indeed, under Section 214(c), defense, national security, law enforcement, and diplomatic agencies -- as "any party in interest"-- are conferred with standing, along with the Commission, to seek an injunction with respect to carrier construction, etc. contrary to the provisions of Section 214.

8. Hence, in reading Section 214(a) and(b), it is beyond doubt that Cogress intended -- indeed, mandated -- that no carrier service provision would proceed without the carrier first (a) obtaining certification from the Commission and (b) appropriate notice being served, with a statutory right-to-be-heard, with regard to the Secretary of Defense, among others who may be parties in interest. We believe that the Commision's proposal herein for regulatory relief under Section 161(in terms of its proposed repeal and/or modification of *its* rules) directly conflicts with important provisions in Section 214 and the will of Congress[10] and also overrides other

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electronic surveillance efforts, espionage, economic espionage, National Security Emergency Preparedness (NSEP), and communications privacy posed by foreign ownership of telecommunications common carriers. We reassert those concerns here. The Section 214 interagency review process is a primary vehicle for bringing such FBI concerns to the Commission's attention when required.

[9] The Commission has also noted on numerous occasions that it must accord deference to Executive Branch agencies in its public interest determinations, given their expertise and unique competence in their respective subject areas. *See, e.g.*, Foreign Carrier Entry Order, ¶¶ 38, 62-71, and 219.

[10] In *United States v. Larionoff*, 431 U.S. 864, 873 (1977), the U.S. Supreme Court stated the generally accepted principle that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *Id.* In an explanatory note, the Court, citing *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936), continued:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is ... [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Id. Similarly, in *MCI v. AT&T*, 512 U.S. 218, 229 (1994), the U.S. Supreme Court noted, in the context of the Commission's then permissive detariffing policy, that it could "be justified only if

important public interest concerns.

9. As the Commission is aware, the FBI, either acting alone or in concert with others, has petitioned the Commission on occasion to impose terms and conditions to certain Section 214 licenses.[11] The types of terms and conditions typically sought directly implicate vital national security, law enforcement, NSEP, and communications privacy concerns. Without pre-certification notice and the right-to-be-heard, as called for under Section 214, the FBI believes that there invariably will be cases where certain carriers would be able to proceed to offer service, etc., with significant resulting harm to national security, law enforcement, and other equities, and where remedies, if any, would be too little and too late.[12] Our view, we believe, is

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it makes a less than radical or fundamental change in the [Communications] Act's tariff-filing requirement." In our opinion, the Commission's proposal to permit post service offering applications for Section 214 certificate authorization by unaffiliated international communications common carriers is neither consistent with, nor in furtherance of, Section 214's mandates. Rather, it contradicts the stated will of Congress. Moreover, to the extent that the foregoing Section 214 provisions themselves more specifically represent the Congress' assessment of certain "public interest considerations" central to the public interest, the proposal also would be at odds with that as well.

[11] *See, e.g.*, the FBI and DOD Agreement with MCI Telecommunications Corporation (MCI) and British Telecommunications plc (BT), attached as terms and conditions to their license by the Commission, with respect to the once intended MCI-BT merger, GN Docket No. 96-245. Of course, other circumstances overtook this merger, and it was never consummated.

[12] We also believe that, as an unintended consequence of "post" service offering filings, as proposed in this NPRM, some carriers would mistakenly, but inevitably, view the Section 214 certification requirement in a lesser light. Consequently, we believe that, whereas obtaining Commission approval through the long-standing Section 214 application process prior to offering service has constituted a "bright line," serious statutory compliance matter for carriers, post-licensing filings will likely be viewed by carriers more as a purely ministerial advisement of lesser significance -- such, perhaps, that a carrier filing might never be made or such that, if later detected, the failure to file could be responded to with inadequate assertions of inadvertence. If such occurrences were to come to pass, there may be no effective triggering mechanism for Executive Branch review for national security, law enforcement, and other important public interest concerns.

shared by the Department of Defense (DOD), as expressed by DOD in its Comments in response to the Commission's Foreign Participation NPRM:

> The DOD does not take a position on the Commission's proposal to adopt a "strong presumption in favor of approval" of applications from foreign carriers or investors from WTO member countries, with regard to the trade policy and other economic issues that are inherent in the public interest analysis under both 310(b)(4) and 214. However, we strongly object to any such presumption in the national security arena. National security issues should be affirmatively resolved before an application from a foreign affiliated[13] carrier is granted by the FCC. No presumption in favor of approval should be applied with respect to a public interest review for national security. (emphasis added).[14]

10. In reviewing the instant NPRM, especially the language found in the Introduction and in ¶¶ 4-11, we note the Commission's focus on identifying regulations "that are overly burdensome or no longer serve the public interest" (emphasis added) and its past "streamlining" efforts. Indeed, as the Commission points out, the great majority of international Section 214 applications currently are granted on a streamlined basis; and such applications, if not opposed, are deemed granted 35 days after public notice, thereby enabling a carrier to commence operations on the 36th day. NPRM at ¶ 7. Given the current "expedited" Commission processing (and expedited Executive Branch review[15]), frankly it is hard to understand how any

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[13] Although here the DOD comment is directed at "affiliated," as opposed to "unaffiliated," international service, the important point DOD makes is that national security issues must be resolved before any Commission application is approved. As noted elsewhere in DOD's comments, economic considerations, such as affiliation or the lack thereof, are largely immaterial in any national security analysis.

[14] Comments of the Secretary of Defense to the Commission's Foreign Participation NPRM, dated July 9, 1997, at 6-7.

[15] Executive Branch national security, law enforcement, foreign policy, and trade-related agencies are given a scant 21 day period (actually less given mail delivery time) for review and comment back to the Commission.

carrier could assert persuasively that it had been meaningfully delayed in pursuing international service under the existing fast track regime or that such regulatory regime is "overly burdensome"(emphasis added). While arguments for an even faster, minimalist Commission review presumably might be advanced if "economic competitiveness" were the only consideration, such is not the case. Rather, given the "other" well-recognized and formidable (non-competition-based) public interest factors and considerations, such as national security, law enforcement, foreign policy, and trade, it would appear to be quite imprudent for the Commission to effectively negate meaningful review for these equities *prior* to certification, where the exclusive driver for dispensing with such prior review is essentially an interest in maximizing to nearly the fullest degree "regulatory relief." At a minimum, such a course of action fails to prudently balance all of the legitimate equities involved. Moreover, we submit that regulatory relief that would preclude *pre-certification* national security, law enforcement, foreign policy, and trade review would patently not "serve the public interest."

11. In short, the regulatory "safeguards" discussed by the Commission in ¶ 8 of the NPRM are simply ones related to economic and competitiveness factors. If the instant proposal were adopted, the "safeguards" that the national security and law enforcement communities currently rely upon under Section 214 and the Commission's implementing rules would be significantly eroded.[16]

12. The FBI also has difficulty understanding the *extent of* the benefit of the proposed change if, as outlined under proposed rule § 63.25, non-dominant international communications

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[16] Although the Commission ultimately articulates a public interest finding, we believe that only defense, intelligence, and law enforcement agencies are competent to decide whether or not there is an unacceptable national security or law enforcement risk.

common carriers will still be required to file with the Commission within 30 days of their commencing service in any event. Since regulatory filings are not foregone but only delayed, the overall value of the proposal appears tenuous. Moreover, it is entirely possible that it may be to the benefit of a carrier (in a number of regards, including economically) to have submitted its application to the Commission and to Executive Branch review prior to offering service. In this regard, if for example a national security or law enforcement agency sought and obtained through the Commission the attachment of certain reasonable terms and conditions to a license and certificate, the actions that a carrier may then be required to take most likely would have been easier and less expensive if they had been undertaken before, rather than after, the commencement of service.

13. Since the position we have outlined above is one of general applicability to all carriers, be they small or large, resellers or facilities-based, be they affiliated or not, and without reference to the type of service offered (to include CMRS), we would not admit any exceptions to our general opposition to the concept of blanket-authorized, pre-certification service provision by international communications common carriers.

14. The FBI agrees with the Commission with reference to its tentative conclusion not to employ forbearance in treating international Section 214 authorizations for any class of applicants. We agree with the Commission in large part when it states that "it is important to continue to require that service be provided only pursuant to an authorization that can be conditioned or revoked." NPRM at ¶ 10. We would say that service should only be permitted pursuant to an authorization that can be conditioned, ***denied***, or revoked.

15. Therefore, the FBI strongly believes, for the reasons set forth above, that the

Commission should reconsider its proposal to grant blanket Section 214 authorization for international telecommunications services offered in markets where the applicant-carrier is not affiliated with a carrier operating in the destination market (and any other blanket Section 214 authorizations considered in this NPRM).

B. Forbearance from Pro Forma Assignments and Transfers of Control; and
C. Provision of Service by Wholly Owned Subsidiaries

16. In its NPRM, the Commission proposes to utilize "forbearance" with regard to prior application and approval requirements as they pertain to certain categories of carrier "assignments and transfers of control" that are deemed by the Commission to be *pro forma*. NPRM at ¶¶ 12-21. The Commission notes in this NPRM the statutory forbearance authority conferred upon it by the Congress under Section 10 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 160, as well as the three criteria which (if all are met) permit such forbearance under 47 U.S.C. § 160(a). The third criterion under § 160(a) specifies that forbearance must be consistent with the public interest.

17. At ¶ 12, the Commission notes that in 1997 it had granted approximately 40 *pro forma* assignments and transfers of control. As apparent justification for the proposed rule, the Commission notes that "[n]one of those applications raised any issues relevant to serving the public interest by promoting competition or preventing anticompetitive conduct." The FBI, of course, would defer to the Commission on its assessment of economic competition in the telecommunications marketplace. But, as noted above, there is substantially more to a public interest determination than purely economic competitiveness considerations. As with any license or certification application, a full and proper public interest review and determination

necessarily includes other factors (*inter alia*, national security, law enforcement, foreign policy, and trade considerations).

18. Although it may be true that a number of the categories identified by the Commission in ¶ 14 may not adversely impact the foregoing non-competition-based considerations, it is quite possible that others may, at least in the national security and law enforcement area. Among the categories the Commission proposes for *pro forma* transaction "forbearance" treatment would be one ("5") involving an "assignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa ...." Given the fast-evolving international telecommunications marketplace with a host of worldwide corporate relationships and affiliations, it is entirely likely that the FBI could be comfortable with a particular carrier (having previously reviewed the original 214 application), but have a strong objection to a license and/or certificate transfer or assignment to that carrier's parent company or subsidiary (or at least absent a condition to the license and/or certificate being attached). Again, although it may be that the public interest analysis and determination could be essentially identical when considering only the economic competition factor, the analysis and determination could be quite different when other public interest considerations, such as national security or law enforcement, are taken into account.

19. As pointed out above, absent pre-certification notice and the right-to-be-heard, as required under Section 214, the FBI believes that there invariably will be cases where certain carriers would be able to proceed to offer service, etc., with significant resulting harm to national security, law enforcement, and other equities, where the remedies, if any, would be too little and too late. Indeed, at ¶19, the Commission proposes that the delayed carrier notice "letter" to the Commission regarding assignments will not even generate any wider notice: "We tentatively

conclude that we need not place those letters on public notice because they will raise no substantial public interest issues upon which public comment would be necessary."

20. Whereas the Commission has offered at least some analysis and justification for this *pro forma* transaction proposal as to the first and second "prongs" or criteria required to support forbearance under Section 160(a)(*see, e.g.*, ¶¶ 15-16), we do not find any articulation or justification to support the Commission's sweeping tentative conclusion "that the third prong of the forbearance standard is met ... that *pro forma* assignments and transfers of control of international section 214 authorizations do not raise public interest concerns and that we should therefore cease requiring carriers to obtain prior Commission approval of such transactions" (emphasis added). NPRM at ¶ 17.

21. Although the Congress specified in 47 U.S.C. § 160(b) (Competitive effect to be weighed) that, in determining whether forbearance is proper under Section 160(a)(3), the Commission must consider competitive market conditions and competition among service providers, such language does not purport to alter generally the breadth of the Commission's long-held public interest analysis, as alluded to above. Section 160(b) simply states that the competitive considerations, which are to be "weighed," may be the basis for a public interest finding for forbearance. If Congress had intended to make this "consideration" alone exclusive and dispositive, it could have said so clearly; it did not.

22. Therefore, the FBI objects to the Commission's proposal regarding forbearance from requiring prior carrier applications to the Commission, and prior Commission approval of such applications, as to so-called *pro forma* assignments and transfers, at least as to category #5 set forth in ¶ 14 of the NPRM, because, in our estimation, it does not fully satisfy the public interest

under 47 U.S.C. §160(a)(3). Other public interest considerations, such as national security and law enforcement, militate against such pre-review and approval authorizations. For the same reasons as set forth above, the FBI also opposes the Commission's proposal, discussed in ¶ 22, that would provide "that an international Section 214 authorization effectively authorizes the carrier to provide services through its wholly owned subsidiaries."

D. Authorization to Use All Non-U.S.-Licensed Submarine Cables and Simplification of the International Section Exclusion List;
E. Section 214 Authorizations for Construction of New Submarine Cable Facilities

23. Although the DOD traditionally has been charged with reviewing international cable system licenses under provisions of the Submarine Cable Landing License Act, 47 U.S.C. §§ 34-39, we also understand that a concurrent review is available to DOD and others under 47 U.S.C. § 214. The FBI has recently been given National infrastructure protection responsibilities, with a leading role in such through the National Infrastructure Protection Center (NIPC), and it is likely that certain carriers and cable landing systems could be of concern to the FBI, thereby warranting pre-licensing review and approval. If assurance is given that the FBI would have an opportunity for review and a right-to-be-heard for any such cable landing license, under *either* 47 U.S.C. §§ 34-39 *or* 47 U.S.C. § 214, it would suffice. (See the Commission's statements confirming the availability of such notice and right-to-be-heard under provisions of the Submarine Cable Landing License Act, 47 U.S.C. §§ 34-39, and the Commission's Rules § 1.767, at ¶ 30 of the NPRM.) However, for the same reasons as set forth above, we would object to the Commission's proposal absent some regime providing such review and right-to-be-heard prior to the grant of an authorization for a cable system license.

24. In the NPRM at ¶ 28, the Commission tentatively concludes that it should not modify

its current practice of requiring specific Section 214 authority for the use of all non-U.S.-licensed satellite systems unless otherwise indicated on the exclusion list. It further tentatively concludes that a decision whether to permit a particular facilities-based carrier to use a non-U.S.-licensed satellite system or whether generally to permit use of a non-U.S.-licensed satellite system by all facilities-based carriers should be made pursuant to the policies adopted in the *DISCO II Order*. We agree with the Commission that non-U.S.-licensed satellite systems remain a matter of sensitivity requiring ongoing Section 214 prior review and authorization, and that such systems therefore are not proper subject matter for the Commission's current NPRM "regulatory relief" endeavor. We also understand that, under DISCO II, traditional Executive Branch notice, review, and right-to-be-heard will continue prior to the granting of such licenses, as is required under Section 214. While satellite space stations are likely to be less problematic than terrestrial gateways and their placements, prior law enforcement and national security-based review is still necessary.

25. The FBI would not oppose the Commission's proposed treatment of new construction of submarine cable facilities, as set forth in ¶¶ 29-33, as long as the review and right-to-be-heard requirements under the Submarine Cable Landing License Act remain available for the FBI.

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

May 24, 1995

Honorable John D. Dingell
House of Representatives
Washington, D.C.

Dear Congressman Dingell:

In response to your request, we would like to identify for you some serious concerns that the FBI and the DEA share about proposals to permit foreign ownership of telecommunications common carriers. The nature of these concerns is that vital U.S. law enforcement, intelligence, and national security interests have not been adequately addressed, even in the most recent proposals, and that there would be substantial and unacceptable risks to these interests. We would appreciate the opportunity to provide a classified briefing to the Committee about our concerns.

o Telecommunications networks are critical and unique parts of any nation's information infrastructure. They are the central conduits for transacting a great deal of governmental business and private commerce. Control of the networks has tremendous importance. Although U.S. law prohibits unauthorized interception of communications and disclosure of lawfully-authorized government electronic surveillance and record acquisitions, violations by a common carrier, as a practical matter, are undetectable. As was properly recognized over 60 years ago, common carrier licensing by the Federal Communications Commission is intended not just to ensure widespread and nondiscriminatory service at reasonable charges, but also "for the purpose of the national defense .. and of promoting safety of life and property." 47 U.S.C. 151. We continue to believe that national security and public safety considerations must be central to any modifications of our telecommunications laws.

o Even where the foreign corporation is privately-held, we believe that a foreign-based company could be susceptible to the influences and directives of its own

government. There are numerous examples of foreign companies being used and directed by their governments to carry out, or assist in carrying out, government intelligence efforts against the U.S. Government and/or major U.S. corporations.

Companies in many countries are culturally acclimated and thoroughly accustomed to carrying out such intelligence directives in ways and in degrees unheard of in the U.S. Unlike under U.S. law, where common carrier assistance is tied to court authorizations, foreign companies (including foreign common carriers) are much more subject to informal government influence. There is no reason to believe that such long-standing government influences would cease if such a company were licensed in the U.S. To the contrary, there is every reason to believe that this circumstance could lead to much greater and more pervasive foreign government influence in many instances.

Foreign governments could affirmatively task a foreign carrier to covertly intercept communications (or copy records) of U.S. Government agencies or major U.S. corporations (for purposes of stealing trade secrets, acquiring other proprietary information, or monitoring efforts to secure business internationally). Given a common carrier's central office intercept capabilities, such interceptions could be easily effected without detection.

o Of particular interest to many foreign governments would be U.S.-based efforts to conduct electronic surveillance regarding targets associated with that country. Such targets could be foreign intelligence officers, agents, or related entities. In addition, there are a number of countries where the target could be associated with criminal interests known to, and tolerated by, the foreign country (e.g., international drug-trafficking). In these instances, any time a U.S. law enforcement or counterintelligence agency sought to conduct electronic surveillance under Title III or FISA, or sought records concerning subjects associated with the foreign country, the foreign carrier may be approached by the foreign government to pass such information along to it. In turn, such information could be relayed to the targets thereby compromising important investigations. For example, U.S. law enforcement is aware of

instances where a common carrier outside of the U.S. has been penetrated by the Cali drug cartel and highly sensitive information regarding contacts with local law enforcement has been used by the cartel to murder individuals thought to be cooperating with law enforcement.

o Operational control of common carrier records, data bases, line information, and central office facilities by a foreign-based company places sensitive governmental and private sector information in a fish bowl. Such immediate access lays wide open not only abundant amounts of information about U.S. law enforcement and intelligence targets, but also exposes sensitive information about government official's office and private home telecommunications service, personal data regarding them maintained in carriers' subscribers files, and line appearance information (indicating precisely where such official's phones could best be discretely tapped, assuming the company/employee chose to by-pass the handier central office access).

o A foreign-based company licensed as a carrier in the U.S. would immediately become privy to details of the current technological intercept capabilities and vulnerabilities of the U.S. law enforcement and intelligence agencies with regard to the services and features they offer. The acquisition of such information by the foreign country and its operatives could serve as a guide to how to avoid and evade U.S. surveillance. In fact, a listing of where such technological impediments (vulnerabilities) were recently found to exist was furnished to selected Congressional staffers in a classified report incidental to Congressional consideration of the Digital Telephony legislation last year.

o Under the Modified Final Judgment in the AT&T divestiture case, common carriers are required to comport with National Security Emergency Preparedness (NSEP) practices in order to immediately respond to U.S. Government telecommunications requirements when national emergency, disaster, or other critical government telecommunications needs arise. If a foreign-based carrier were called upon to immediately respond to some disaster such as an act of state-sponsored terrorism, there would be both doubt and risk to the government if the common carrier was influenced or otherwise controlled by a foreign government associated with such terrorism.

Honorable John D. Dingell

Law enforcement does not oppose greater global telecommunications competition or investment as such. Rather, we believe that as such initiatives are explored, vital U.S. law enforcement, intelligence, and national security interests must be seriously considered and properly resolved at the same time. Presumably, the goal of greater international business opportunities for foreign and U.S. carriers that is espoused by these proposals could be pursued without direct or indirect foreign corporate control over the operational, technical, and personnel aspects of the common carrier business which, as alluded to above, so readily and directly implicate vital domestic and national security interests.

Sincerely yours,

Louis J. Freeh
Director

Sincerely yours,

Thomas A. Constantine
Administrator